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In The

Supreme Court of the United States

October Term, 1997

CHARLES H. KUIPER, SR., MAE E. KUIPER and CHARLES A. KUIPER, JR., d/b/a CHARLES H. KUIPER & SON FARMS,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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I.

THE BRIEF IN OPPOSITION HAS INCORRECT STATEMENTS.

Several mischaracterizations contained in Respondent's Brief in Opposition require reply. First, Donald Spangenberg, the Kuipers' agronomist, did not testify "that the only literature he had read about SCEPTER was its EPA approved labeling." Among other things, Spangenberg testified that his employer was on the AmCy mailing list. Spangenberg regularly received and reviewed AmCy literature. This literature informed Spangenberg's recommendation to the Kuipers that SCEPTER would be "safe" to follow corn. SCEPTER's safety to follow corn was a major factor in Spangenberg's recommendation. If he had believed there to be a potential for damage to follow corn, Spangenberg would not have recommended SCEPTER. The evidence in the record shows various misrepresentations by AmCy to which Spangenberg had been subjected.

Furthermore, consideration of this testimony and evidence reveals a related mischaracterization on the part of AmCy. Respondent is seriously misguided in its assertion that this case is distinguishable from *Gorton et. al. v. American Cyanamid Co.*, 194 Wis. 2d 203, 533 N.W. 2d 746 (Wis. 1995), *cert. denied*, __ U.S. __, 133 L. Ed. 2d 701 (1996) because the "substantially different" analysis presents a question of fact. It is undisputed that representations of "safety" to follow corn were made to the Kuipers. Consequently, the question of substantial difference falls within the generally accepted principle that questions relating to the application of a statute to a given set of facts are matters of law for the court.[1] *See* 75A AM. JUR. 2D *Trial* § 718 (1991).

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1. The parties' disagreement relating to the relevance of AmCy's advertising and promotional literature itself does not negate the existence of Spangenberg's statement of safety. Whether the

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It follows that AmCy's efforts to distinguish the preemption issues in this case from those of *Gorton* through the manufacture of a nonexistent fact question fail. In *Gorton*, the Wisconsin Supreme Court recognized that "Safe" does not appear on the label and, therefore, claims that SCEPTER is safe substantially differ from what is stated on its label. *See Gorton*, 194 Wis. 2d at 226, 533 N.W. 2d at 755. The Seventh Circuit Court of Appeals has decided that claims that a herbicide are "Safe" are merely a repetition of labeling. *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 663 (7th Cir. 1997). There is a direct conflict between *Kuiper* and *Gorton*. As a result, the Kuipers have been deprived of their remedy for their crop damages while the Gortons were not.

AmCy has also attempted to distance itself from *Gorton* by stating that "Cyanamid neither joined nor opposed" the request that the district court defer ruling on the parties' pending motions until the Wisconsin supreme court rendered its decision in *Gorton*. Nevertheless, the record clearly establishes that trial counsel for both parties were in agreement that *Gorton* would affect, if not control, this case.

Furthermore, although AmCy admits that it did not request consideration of the preemption issues when it petitioned for this Court's review in *Gorton*, it now asserts that it did "strongly disagree." The fact is that AmCy did not raise the preemption

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Kuipers will be able to establish sufficient foundation for the admission of evidence supplemental to the oral statements of Spangenberg will be determined at the time of trial. This result is implicit in the district court's finding that the issue of "cause" is a jury question. In any event, the existence of a jury question regarding cause is not a sufficient basis upon which to dispute the need for Supreme Court review and clarification of the legal issues attendant to this case.

issue in accordance with the rules of this Court. In the meantime, AmCy had "forum shopped" in the *Kuiper* case to find another court which might rule differently than the state court had ruled in *Gorton*. AmCy avoided the risk of receiving an unfavorable preemption ruling from this Court by excluding the issue of preemption from its petition for certiorari to this Court in *Gorton*.

AmCy also asserts that "Cyanamid was not in violation of any discovery duty at the time of the [summary judgment] ruling." This statement is also incorrect. AmCy was sanctioned by the Magistrate for its violation of the continuing obligations to provide discovery imposed by the Federal Rules of Civil Procedure. In addition to sanctions, AmCy was expressly ordered to comply by new dates then designated by the Magistrate. The Magistrate's Order documented the violation and supplemented the Federal Rules. It did not excuse or negate AmCy's violations. The existence of the Order speaks for itself.

II.

REPLY TO BRIEF IN OPPOSITION'S ASSERTIONS REGARDING FEDERAL PREEMPTION.

The incorrect statements pointed out in the prior section of the brief reflect on the accuracy of the issues as stated by AmCy in its Brief in Opposition.

A. The Petition Should Be Granted Because Issues Presented Warrant Review by the Court.

In its brief at page 7, AmCy belittles the Wisconsin Supreme Court's *Gorton* decision. AmCy states that *Gorton* is "poorly reasoned and result driven" and is an "aberration" with "little if any impact, even in Wisconsin". Embolden by its belittlements AmCy asserts: "There simply no conflict on FIFRA preemption worthy of this Court's review."

AmCy imposes a "worthy of this court's review" gloss on this Court's Rule 10, in an apparent attempt to detract from the importance of the issues presented by this petition. Rule 10 sets forth those considerations which bear on this Court's favorable exercise of its judicial discretion. "Worthy" is not one of the included criteria.

Even if for purposes of argument only, one were to accept the gloss placed by AmCy on Rule 10, the petition should still be granted. Because the decisions of the federal courts below contradict the Wisconsin Supreme Court decision in *Gorton* this petition presents a classic conflict which only this Court can resolve. Under the Wisconsin Constitution the Kuipers have been guaranteed a "certain remedy" for injuries they received in their property. In their construction of FIFRA the federal courts below have deprived Kuipers of rights guaranteed to them by Wisconsin's Constitution.

Additionally, the ascertainment of whether federal legislation deprives citizens of their state constitutional rights is a decision which is "worthy of this court's review". Only by the grant of this petition will the Kuipers, and others who suffer damage from registered chemicals, know whether Congress intended to abolish common law remedies for the damages arising from FIFRA registered pesticides.

B. The Petition Should Be Granted Because of the Unwarranted Judicial Expansion of the Scope of FIFRA Preemption.

This Court should grant the petition because of the ill-defined breadth of FIFRA preemption as asserted by AmCy. At page 8, AmCy says that a multitude of federal and state courts have held

> that § 136v(b) of FIFRA expressly preempts any state law claim **which directly or indirectly implicates the adequacy of the warnings or other information on a pesticide's EPA-approved labeling.**

(Emphasis added). Holdings of courts which establish such a broad and ill-defined standard for preemption conflict with the relevant decisions of this Court, which states that preemptive language must be read "fairly but narrowly". *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

Also, a review of FIFRA preemption cases reveals an invidious unwarranted judicial expansion of the scope of preemption. In *Worm I* and *Worm II*, the Fourth Circuit Court of Appeals explained that the definition of labeling "would not appear to include general advertising statements not made in connection with a particular sale" and that actions based upon language which is "identical" to labeling are preempted. *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1307 n.2 (4th Cir. 1992); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993). The Ninth Circuit Court of Appeals subsequently found FIFRA preemption where liability is "essentially predicated" upon the language in the manufacturer's label because no statements that are inconsistent with or which go beyond labeling have been made. *Taylor v. Pure-Gro*, 54 F.3d 555, 562-63 (9th Cir. 1995). The scope of preemption was expanded more when the Fourth Circuit as a prerequisite to a viable claim required statements which "substantially differ" from a pesticide's EPA-approved labeling. *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 127, 130 (4th Cir. 1995).

On the *Kuiper* facts, the Seventh Circuit has further expanded preemption. It has found preemption because, in its judgment, AmCy's misrepresentations "essentially repeat"

labeling information. *Kuiper*, 131 F.3d at 663. Consequently, respondent now argues to this court that FIFRA preempts "any state law claim which directly or indirectly implicates the adequacy of the warnings or other information on a pesticide's EPA-approved labeling." (Brief in Opposition, p. 8).

Not only is this standard ambiguous, but it also effectively disenfranchises states of their police powers over wrongful actions against their citizens. The petition should be granted so that the Court can define the scope of preemption for the benefit of all courts who must decide whether and to what extent, if at all, FIFRA preempts.

This Court has also stated that Congress does not preempt state causes of action by legislative silence. FIFRA is silent on whether it bars common law damage remedies relating to registered chemicals. A number of lower courts have found federal preemption in spite of Congress's legislative silence. Those holdings conflict with this Court's decisions relating to preemption. The petition should be granted to resolve these conflicts.

AmCy is the purveyor of "-cides". Rachel Carson's work established how "-cides" had silenced Spring. Following Rachel Carson's book, *Silent Spring*, Congress took action. It is hard to believe that the action taken by Congress was intended to silence people, *i.e.* to forever mute the voices of people damaged by "-cides".

CONCLUSION

The petition should be granted.

Respectfully submitted,

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